Supreme Court, U.S.
FILED
00-589 OCT 12 2000
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

RAYMOND A. BERG, JR.,

Petitioner,

v.

COUNTY OF ALLEGHENY,
ALLEGHENY COUNTY ADULT PROBATION SERVICES,
DEBBIE BENTON, RICHARD R. GARDNER,
GLENN ALLEN WOLFGANG, GINNY DEMKO,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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71 pp

QUESTIONS PRESENTED FOR REVIEW

1. Has petitioner stated a § 1983 civil rights claim, for violation of his protections under the Fourth, Fifth and Fourteenth Amendments which should have survived a motion for summary judgment, against Ginny Demko, a criminal court clerk, who generated, by way of her computer, an arrest warrant, at the request of Richard A. Gardner, a probation officer, who supplied Ms. Demko with the necessary information contained on an Arrest Warrant Information Sheet, for the issuance of an arrest warrant for Paul Banks who violated his probation, who then in error issued an arrest warrant for petitioner, against whom there was no criminal matter pending and who was then arrested and incarcerated for four days?

2. Has petitioner stated a § 1983 civil rights claim for violation of his protections under the Fourth, Fifth and Fourteenth Amendments which should have survived a motion for summary judgment, against Richard R. Gardner, a probation officer, who requested by way of an Arrest Warrant Information Sheet addressed to Ginny Demko, a criminal court clerk, that an arrest warrant be computer generated by her for Paul Banks for violation of his probation when, after determining that an arrest warrant was issued, but not for Paul Banks, then instructed Ginny Demko to issue another computer generated warrant but failed, at the same time, to direct her to retrieve the warrant issued in error and in failing to retrieve the errant warrant himself?

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PETITION FOR WRIT OF CERTIORARI

Raymond A. Berg respectfully requests that a Writ of Certiorari issue to the United States Court of Appeals For The Third Circuit in order that the questions presented for review be resolved in keeping with the analysis of Justices Ginsberg, Stevens, Souter and O'Connor in *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L.Ed. 2d 34 (1995), thereby reversing the affirmance of the Third Circuit panel as to the entries of summary judgment in behalf of respondents Demko and Gardner.

OPINIONS BELOW

The petitioner-plaintiff appealed from the Opinions and Orders of the United States District Court (Hon. Donetta W. Ambrose) for the Western District of Pennsylvania dated September 22 and September 23, 1998, in Civil Action No. 97-928 granting the motions for summary judgment of all appellees (defendants).

On appeal by the petitioner from the opinions of Judge Ambrose to the United States Court of Appeals for the Third Circuit at No. 98-3557 by Per Curiam opinion filed July 17, 2000 (Circuit Judges Mansmann, Scirica and Nygaard) the entries of summary judgment in behalf of Richard R. Gardner and Ginny Demko were affirmed and the entries of summary judgment in behalf of Glenn Allen Wolfgang and County of Allegheny were reversed and the case was remanded for further proceedings consistent with the opinion. 219 F.3d 261

STATEMENT OF JURISDICTION

On August 17, 2000 petitions for rehearing filed by all parties herein were denied.

On August 31, 2000 Circuit Judge Nygaard stayed until November 15, 2000 the issuance of the certified judgment in lieu of formal mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure at the request of defendant Wolfgang.

This Petition is taken pursuant to 28 U.S.C. § 1254(1) from the denial of petitioner's (appellant's) Petition For Panel Rehearing denied on August 17, 2000 by Circuit Judge Nygaard.

CONSTITUTIONS AND STATUTES INVOLVED

1. *Amendment IV of the United States Constitution*

   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and *no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing* the place to be searched, and *the persons* or things *to be seized.*

2. *Amendment V of the United States Constitution*

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offence twice to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

3. *Amendment XIV of the United States Constitution*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

4. *42 United States Code Annotated § 1983. Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or *causes to be subjected, any citizen of the United States* or other person within the jurisdiction thereof *to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law*, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall

be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

STATEMENT OF THE CASE

Federal jurisdiction in the court of first instance was based upon a violation of the petitioner's Fourth, Fifth and Fourteenth Amendment rights under the United States Constitution, along with his right to recover for those violations under 42 U.S.C.A. § 1983.

The petitioner, Raymond A. Berg, Jr., by his deposition, testified that for the past 12½ years, has been a resident of southwestern Pennsylvania, residing in Beaver County, adjacent to Allegheny County. Since 1993 he has lived at 4 Apple Grove with Carol R. Green and her daughter, Allyson, age 9. Their mailing address is Sewickley, PA 15143.

On December 12, 1989, Mr. Berg was arrested in Allegheny County by the Ohio Township Police for a DUI violation for which he served 6 months probation and from which he was released on May 30, 1991 by his Probation Officer, the former Defendant, Debbie Benton.

By his deposition, respondent Richard R. Gardner, the Supervisor of the Office of the Allegheny County Adult Probation Services for which he had worked for almost 20 years testified that on July 14, 1994, he was reviewing the probation file of one Paul Banks. Because Mr. Banks was in violation of his parole requirements,

Mr. Gardner drafted a Warrant Request Form, which was executed by Judge Lutty, Court of Common Pleas of Allegheny County, who ordered that a warrant be issued for the arrest of Mr. Banks at Criminal Complaint Number 9004165. Upon receipt of the said Warrant Request Form *with Judge Lutty's signature,* Mr. Gardner generated an Arrest Warrant Information Sheet, referred to as a "Facsimile Sheet" and distributed it to the Warrant Clerk's office of the Criminal Court Division of Allegheny County for processing and issuance.

Virginia "Ginny" L. Demko, by her deposition, testified that she was the warrant clerk employed by the County of Allegheny who was responsible for issuing and clearing all of the arrest warrants in Allegheny County.

It was the policy and procedure of the Warrant Clerk's Office for Ms. Demko to process the Facsimile Sheet which she had received from Mr. Gardner on *August 3, 1994* and to then create a computerized arrest warrant. This particular Facsimile Sheet provided her with the following information:

Name:	Paul Banks
Violation of Probation:	Theft by Unlawful Taking
D.O.B.:	08-21-70
Criminal Complaint No.:	9004165
SS#:	164-56-9753
Address:	3551 Marion Avenue, Apartment 3 Finleyville, PA 15332

To begin the arrest warrant creation procedure, Ms. Demko would first enter into her computer the Criminal Complaint number listed on the Facsimile Sheet. The computer would then process the number and provide Ms. Demko, on her computer screen, the name and "basic information" of the arrestee, which information the computer obtained from the Integrated Court Information System, ["ICIS"].

In this case, Ms. Demko typed in the incorrect Criminal Complaint Number. She erroneously entered the Criminal Complaint Number of Raymond Berg (9001465) rather than that of Paul Banks (9004165). Upon entering Mr. Berg's number, the computer screen provided Ms. Demko with the following:

Name:	Raymond Berg Driving Under Influence of Alcohol or Contr[olled] Substance Fail to Drive Right Side Rd
D.O.B.:	12/04/43
C[riminal] C[omplaint] No.:	9001465
SS#:	174-34-7410
Address:	4 Apple Grove Sewickley, PA 15143

Failing to compare all of the correct arrestee information which was provided to her on Mr. Gardner's Facsimile Sheet, Ms. Demko, says that she did not notice all of

the discrepancies as to the pertinent information for the proper arrestee, Mr. Banks. She states that she simply deleted Mr. Berg's correct "4 Apple Grove, Sewickley, PA" address and typed into the computer the "3551 Marion Avenue, Finleyville, PA" address of Mr. Banks.

She also failed to note that all of the other information on her computer screen, *i.e.*, the arrestee's name, his date of birth, his criminal complaint number, his social security number and the reason for his arrest, was also incorrect.

Mr. Gardner testified that the correct information was "readily available" to Ms. Demko by which she could ascertain whether or not the correct warrant was issued for the correct person. He stated that Ms. Demko had failed to make "a good visual check" to see that all of the information on the Facsimile Sheet matched the information on the Arrest Warrant which she created.

Ms. Demko, by this process, generated a void arrest warrant for Raymond Berg instead of the valid arrest warrant for Paul Banks which was approved by Judge Lutty.

She then date stamped the Facsimile Sheet of Paul Banks and sent it back to Richard Gardner which indicated to him and to her that an Arrest Warrant was generated as he requested and for the person he requested.

Ms. Demko then sent the void arrest warrant for Mr. Berg to the Sheriff's Office for processing and for pick up by someone from the Fugitive Task Force.

On August 16, 1994, respondent Gardner was again reviewing Paul Banks' file when he discovered that although the Facsimile Sheet which he sent to Ms. Demko was date stamped August 3, 1994 by Ms. Demko which indicated to him that an arrest warrant had been issued for Paul Banks per procedure, there was no indication in his computer system, ICIS, that an Arrest Warrant had, in fact, been issued for Mr. Banks.

Mr. Gardner testified that for only a "brief moment" he considered that perhaps Ms. Demko had, in fact, issued a warrant on August 3, 1994, for a person *other* than Paul Banks, but he claimed that he had no procedure available to him to investigate that possibility. Mr. Gardner failed to act on his belief that an erroneous warrant could have, in fact, been issued.

Mr. Gardner then called Ms. Demko and informed her of his findings. In turn, Ms. Demko again generated an arrest warrant (a second warrant) for Paul Banks. She did not bother, at that point in time, to backtrack and check to see for whom she had erroneously issued an arrest warrant on August 3. Nor did she attempt to physically retrieve the warrant she originally issued which was still sitting in the Sheriff's Office, waiting to be served. Supposedly, there was no recall or cancellation procedure in the computer system or connection with the Sheriff's Office by which to prevent its service upon Mr. Berg.

This warrant was ultimately served by Glenn Allen Wolfgang, a Pennsylvania Constable from Westmoreland County, on *December 30, 1994* at approximately 6:45 p.m.

at Mr. Berg's home during a pre New Year's Eve party, five (5) months after it was issued by Ms. Demko.

Four days after Mr. Berg had been wrongfully arrested and incarcerated, Ms. Demko received a call from Mr. Gardner who informed her of the error which he says she had made as to Mr. Berg's arrest warrant. Ms. Demko eventually processed a Notification to Clear the warrant of Mr. Berg.

Mr. Gardner testified that the probation office has a separate computer system from the system utilized by the Clerk of Courts, from which Ms. Demko generated warrants. Ms. Demko utilizes the Integrated Court Information System computer (ICIS) which does not have direct access to the Probation Office computer utilized by Mr. Gardner. The Sheriff's office has no access to either computer system.

Mr. Gardner utilized this system to supervise Mr. Berg's case, and had it "logged in" as "inactive" in the probation/parole system computer. He testified that no one had access to this system other than probation office personnel.

Gardner further testified that he had no idea how a Finleyville address got onto Mr. Berg's warrant. "How it is there [is] totally beyond me." He stated he was " . . . clueless . . . ".

Mr. Gardner testified that once a person has satisfied his parole requirements and his case is closed, that ICIS reflects no such record and possesses no method in which to record and reflect that the parole requirements were

satisfied. The system does not have the capability to purge stale warrants.

In her deposition, Ms. Demko testified that she did not know the model nor the type of software she utilized to generate warrants. All she did was to take the Criminal Complaint number "from a piece of paper" and put it into the computer. She did not know the meaning of the acronym, "ICIS". The County's policy or procedure did not require the Warrant Clerk to be properly trained as to the ICIS system used to generate arrest warrants.

During her deposition, Ms. Demko was unable to respond to questions concerning any type of fail-safe system on the computer which could have prevented mistakes as made by her in this case. She said she preferred to "only know my work".

Ms. Demko also testified that she had never seen a document such as Gardner Exhibit 7, Receipt No. 88099, which was the receipt reflecting Mr. Berg's payment in full of his fine dated December 30, 1991, although it was generated on the ICIS computer. She said it was not part of her work.

ARGUMENT

Although the trial judge granted summary judgment as to all defendants, the Third Circuit panel reversed as to the County of Allegheny, the employer of Demko and Gardner, on the issue of municipal liability on the basis that an issue of fact remained whether the County was

"deliberately indifferent" to an obvious risk in the computer system utilized by Ms. Demko in that it " . . . employed a design where a slip of a finger could result in wrongful arrest and imprisonment . . . " (App. 26).

The panel also reversed as to the Constable, Mr. Wolfgang, who served the void arrest warrant since " . . . valid questions concerning the reasonableness of Wolfgang's conduct in this case . . . " (App. 19) were yet to be answered.

However, Circuit Judge Mansmann in her concurring and dissenting opinion indicated " . . . there remains a genuine issue of material fact as to **each** of these defendants." (App. 29)

Petitioner urges that a Writ of Certiorari issue for the reason that the analyses of Justices Scirica and Nygaard are contrary to that contained in this Court's opinion in *Arizona v. Evans*, supra, as to the respondents Demko and Gardner.

Certiorari should be granted to determine whether or not a computer generated arrest warrant inaccurately generated by a criminal court clerk from "accurate" information on her computer screen by virtue of the clerk's failure to properly initiate the warrant process by failing to punch in the correct numbers from the criminal complaint which results in the arrest and imprisonment of the wrong person, creates a § 1983 cause of action against both the criminal clerk and the parole officer who requested the warrant since both additionally knew that a warrant was generated and neither attempted to retrieve

it although it lay in the Sheriff's Office for five (5) months prior to it being executed.

This was not negligent record keeping but a breakdown of the warrant issuing process. The lack of judicial approval for the warrant made it unlawful, illegal, void, invalid and void *ab initio* lacking any probable cause as required by the Fourteenth Amendment.

The only relevant testimony of record is by way of discovery depositions of Demko and Gardner utilized in the summary judgment proceedings. There was no in-court testimony. The lower courts' evaluation of the testimony is therefore fact intensive:

> 1. The rubber hand date stamp placed on the Arrest Warrant Information Sheet by Demko indicated to "all" that a warrant did, in fact, issue on August 3, 1994 as requested by Gardner;
>
> 2. Gardner's testimony also indicates that a warrant was, in fact, generated as he requested by the Arrest Warrant Information Sheet by virtue of the hand date stamp which was dated, according to him, August 6, 1994;
>
> 3. Both Demko and Gardner agree that the date stamp meant that a warrant did issue either on August 4, 1994 (Demko) or on August 6, 1994 (Gardner);
>
> 4. Gardner testified that contrary to the significance of the date stamped on the Arrest Warrant Information Sheet, his computer search convinced him that a warrant had not "in fact" issued as requested by him and he, then, requested Demko to issue one on August 16,

1994 thinking it was, "according to him", the first one to be issued as he requested;

5. At this point in time, on August 16, 1994, Demko, knowing full well she had, in fact, issued a warrant on August 3, 1994, deceitfully failed to reveal that fact to Gardner which warrant was, on August 16, 1994, in the Office of the Sheriff of Allegheny County awaiting pick up for service, five months prior to the arrest of Mr. Berg on December 30, 1994; and

6. By her deception, Demko failed to reveal her true "mistake" to Gardner which, according to Gardner, was that no warrant had issued, when, in fact, Demko knew that she had issued a warrant which warrant process she then duplicated via the same Arrest Warrant Information Sheet on which, according to Gardner, he then modified the date from August 6, 1994 to August 16, 1994.

While the majority (Justices Scirica and Nygaard) agreed that:

1. A government official's liability for causing an arrest is the same as carrying it out;

2. § 1983 anticipates that an individual will be responsible for the natural consequences of his actions; and

3. § 1983 liability for an unlawful arrest can extend beyond the arresting officer for other officials whose intentional actions set the arresting officer in motion;

the majority failed to apply this analysis to the respondents Demko and Gardner. (See App. 15)

While the majority also agreed that a "deliberate indifference" analysis or standard is appropriate by which to judge the conduct of both Demko and Gardner, they failed to apply this standard to the conduct of Demko and Gardner who each testified that the date stamp on the Arrest Warrant Information Sheet meant to them that an arrest warrant had issued as requested in August, 1994 which made them duty bound to retrieve the errant warrant. (App. 20)

For the reason that the conduct of both Demko and Gardner contained triable issues and, therefore, precluded summary judgment, the majority wrongfully removed those issues of credibility from the jury in that:

> 1. Gardner, a parole officer for over 21 years, would have us believe that on August 16, 1994 he did not know that a warrant issued on August 3, 1994 by virtue of Demko's date stamp on the Arrest Warrant Information Sheet which would have compelled him to retrieve the arrest warrant from the Sheriff's Office or instruct Demko to do it;
>
> 2. Demko claims to have failed to know she made a mistake until August 16, 1994 when she was contacted by Gardner to whom she never revealed that her mistake was, not that she failed to issue a warrant, but that she issued a warrant for the **wrong person** and never revealed that fact to Gardner and never attempted to retrieve the errant warrant from the Sheriff's Office prior to her issuing a second warrant.

The majority wrongfully concluded, contrary to the evidence, that neither Demko nor Gardner were on notice

by virtue of the date stamp that a warrant issued which would compel either or both to retrieve same before it could be executed.

The majority also held that Berg had not alleged anything more than "mere negligence" on the part of Demko, (App. 20) when in fact, it is alleged by Berg that Demko was certainly aware that she had issued a warrant, that she issued it for the wrong person, that she delivered it to the Sheriff's Office for execution, that it was in the Sheriff's Office on August 16, 1994 and that she made no attempt to retrieve it showing a deliberate indifference to the ramifications of her failure to act. (App. 21)

Should not a citizen be protected from the reckless misconduct of court officials who, while not part of the arresting process, fail to grasp or choose to ignore, the consequences of their ill considered acts or failure to act.

As stated by Justice Ginsburg in *Arizona*, supra, " . . . this case involves . . . an arrest made when no warrant at all was outstanding against petitioner." 115 S. Ct. at 1196.

This is a glaring example of computerized error posing an appreciable threat to Fourth Amendment interests.

Whereas, *Arizona*, supra, dealt with evidence suppression and the exclusionary rule relating to evidence seized in a criminal case in violation of the Fourth Amendment as a result of clerical errors of court employees, causing incorrect computer records to be created, this case deals with the direct opposite of that situation.

This matter deals with accurate computer records from an un-purged data base of a court computer system, whereby the wrong person is arrested due to the criminal warrant clerk typing in the wrong criminal complaint numbers, seeing the wrong information on her computer screen, failing to recreate the correct information on her computer screen, and instead, incorrectly modifying the information on her screen and then issuing an arrest warrant based upon the modified and incorrect information whereby Mr. Berg was arrested and incarcerated instead of Mr. Banks.

CONCLUSION

This is a glaring example of court personnel denying their personal responsibility in carrying out their court functions by attempting to absolve themselves from culpability resulting in the loss of human liberty by saying "it was the computer and not me." There is no such thing as a jurisprudential computer glitch. None of the respondents indicated that their computer system did not operate properly.

This Petition for Writ of Certiorari should be granted since there remain factual issues to be tried precluding summary judgment and for reason that the majority circuit judges failed to apply the "deliberate indifference"

analysis or standard by which to judge the conduct of both Demko and Gardner.

Respectfuily submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3557

RAYMOND A. BERG, JR.,

Appellant

v.

COUNTY OF ALLEGHENY;
ALLEGHENY COUNTY ADULT PROBATION SERVICES;
DEBBIE BENTON; RICHARD R. GARDNER;
GLENN ALLEN WOLFGANG; GINNY DEMKO

On Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. Civil Action No. 97-cv-00928
(Honorable Donetta W. Ambrose)

Argued March 10, 1999

Before: MANSMANN, SCIRICA and
NYGAARD, *Circuit Judges*

(Filed July 17, 2000)

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OPINION OF THE COURT

PER CURIAM.

Plaintiff Raymond Berg appeals the District Court's grant of summary judgment to all defendants in this civil rights action alleging false arrest and imprisonment based on an erroneously issued warrant. We will affirm in part and reverse in part.

I. Background

On July 14, 1994, Richard Gardner, the supervisor at Allegheny County Adult Probation Services, requested an arrest warrant for Paul Banks, who had violated conditions of his parole. After a judge of the Court of Common Pleas approved the warrant, Gardner sent an Arrest Warrant Information Sheet to Virginia Demko, the warrant clerk responsible for issuing and clearing all arrest warrants in Allegheny County. The Information Sheet listed Banks's name, offense, date of birth, criminal complaint number, Social Security number, and address. On August 3, 1994, Demko generated the warrant using the County's computerized Integrated Court Information System (ICIS). ICIS is operated by typing a criminal complaint number into the computer, which automatically retrieves the remaining information and displays it on the user's screen.

Unfortunately, Demko transposed two digits in Banks' criminal complaint number. As a result, she entered the criminal complaint number of plaintiff, Raymond A. Berg, Jr., who three years earlier had completed a six-month parole term for driving under the influence. Demko's computer screen displayed Berg's name, date of birth, criminal complaint number, Social Security number, and address, all of which were different from the information on the Arrest Warrant Information Sheet. Berg concedes, however, that Demko noticed only that the address on the screen was different from the address on the Information Sheet. *See* Appellant's Br. at 7. She did not realize that the other information was different as well. *See id.*

Concluding that the ICIS contained an old or otherwise incorrect address for Banks, Demko manually changed the information in the ICIS. She replaced Berg's address, in Sewickley, Pennsylvania, with Banks's last known address, listed on the Information Sheet, in Finleyville, Pennsylvania. That was the only change she made.

Demko then generated the warrant for Berg's arrest and sent it to the Allegheny County Sheriff's Office. Gardner's name and telephone number were written on the warrant as the contact person from whom additional information could be obtained. Demko also returned the Information Sheet requesting the Banks warrant to Gardner after date-stamping it to indicate that the warrant had been issued. Thus, because of Demko's clerical error, and her subsequent decision to change the information contained in the ICIS, an arrest warrant was issued for Berg rather than Banks. Demko later testified in her deposition that, in issuing over 500 warrants per month since 1989, "this is the only occasion where this has ever occurred."

In reviewing Banks' case on August 16, 1994, Gardner noticed that the Information Sheet had been stamped (indicating the issuance of a warrant) but, according to his review of ICIS, no warrant in fact existed. Gardner admits that, "for a brief moment," he *may have* considered the possibility that an erroneous warrant was issued, but would have quickly realized that there was no practical way to determine whether one had. *See* Gardner Dep. at 141:16 through 142:3 (A.397-98). He then called Demko, informed her that no warrant had been issued for Banks, and requested that she issue one. Nothing in the record

indicates that Gardner suggested to Demko, at that time, that she may have processed an erroneous warrant.

Berg's warrant was executed on the night of December 30, 1994, by Glenn Allen Wolfgang, an elected constable in Westmoreland County. Wolfgang, who earned a fee for each person arrested, frequently executed outstanding arrest warrants for Allegheny County, and on December 30 he planned to make four arrests. Before leaving home, Wolfgang retrieved Berg's address and telephone number using a computer software/on-line system he had purchased from a credit union. Apparently, however, he did not notice that the address he retrieved, and the one listed on the warrant for Berg's arrest, were different. He proceeded instead to the Finleyville address listed on the warrant, only to discover that it was an abandoned house. Wolfgang then telephoned Berg and asked for directions to his house. Wolfgang called three or four more times for further directions and took over an hour to drive from Finleyville to Berg's house. In his deposition, Wolfgang described Berg as "[v]ery cooperative" on the telephone.

When Wolfgang arrived, Berg was entertaining guests at his house at a pre-New Year's Eve party. Berg informed Wolfgang that he had never lived in Finleyville and offered to produce release documents proving that he was no longer on parole. After confirming that Berg's birthday and social security number were the same as those on the warrant, Wolfgang refused to look at the release documents, instead telling Berg to bring them with him. Berg did show Wolfgang his driver's license,

confirming that Berg was no longer on parole.[1] But Wolfgang simply told Berg not to take too much time retrieving the release documents because he had three more people to arrest that night.

Wolfgang did call the Allegheny County Sheriff's Office, but after being told that the warrant was still "active," he arrested Berg. Wolfgang did not try to call Gardner. Gardner testified that if Wolfgang had called and asked him about a warrant for Berg's arrest, Gardner would have checked Berg's file and told Wolfgang not to arrest Berg.

At the Sheriff's office, Berg was strip-searched, fingerprinted, inoculated, and placed in the Allegheny County Jail. Because Probation Services and the courts were closed for the holidays, Berg remained in jail until January 3, 1995, or approximately five days. Finally, after intervention by Berg's attorney, Demko issued a Notification to Clear the Warrant and Berg was released.

Berg filed suit against Allegheny County, Gardner, Demko, and Wolfgang in Pennsylvania state court, alleging civil rights violations under 42 U.S.C. §§ 1983, 1985(3), 1988 (1994), and the Fourth, Fifth, and Fourteenth Amendments.[2] The defendants removed the case

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[1] In his deposition, Wolfgang acknowledged knowing that during "the penalty phase" of a DUI sentence a defendant must surrender his driver's license.

[2] Berg also sued his former parole officer, Debbie Benton, and Allegheny County Adult Probation Services. Benton was dismissed with Berg's consent when it became clear that she was not involved in his arrest. The District Court dismissed the Probation Services office, concluding the office is an arm of the

to the District Court for the Western District of Pennsylvania and, following discovery, moved for summary judgment. The District Court granted summary judgment to all defendants, ruling that Berg's arrest was not unconstitutional because the facially valid warrant gave Wolfgang probable cause for the arrest.

II. Legal/Analytical Framework

On appeal, Berg presses only his § 1983 claim.[3] To make a prima facie case under § 1983, the plaintiff must demonstrate that a person acting under color of law deprived him of a federal right. *See Groman v. Township of Manalapan*, 47 F.3d 628, 633 (3d Cir. 1995). Here, it is undisputed that defendants were acting under color of law when they issued and executed the warrant for Berg's arrest.

The next step is to "identify the exact contours of the underlying right said to have been violated." *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998). Section

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County without distinct legal existence. *See Berg v. County of Allegheny*, No. 97-928, slip op. at 4 n.2 (W.D. Pa. Sep. 23, 1998). Berg does not challenge this determination on appeal.

[3] 42 U.S.C. § 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

1983 is not a source of substantive rights and does not provide redress for common law torts – the plaintiff must allege a violation of a federal right. *See Baker v. McCollan*, 443 U.S. 137, 146 (1979). Berg alleges he was subjected to false arrest, false imprisonment, and denial of due process in violation of 42 U.S.C. §§ 1983 and 1985(3), and the Fourth, Fifth, and Fourteenth Amendments.

The Supreme Court has held that when government behavior is governed by a specific constitutional amendment, due process analysis is inappropriate. Although not all actions by police officers are governed by the Fourth Amendment, *see Lewis* at 842-43 (noting that accidents during police chases are not "covered" by the Fourth Amendment), the constitutionality of arrests by state officials is governed by the Fourth Amendment rather than due process analysis. *See id.*; *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997); *Graham v. Connor*, 490 U.S. 386, 394 (1989); *Blackwell v. Barton*, 34 F.3d 298, 302 (5th Cir. 1994). Therefore, we will limit our analysis of Berg's arrest to his Fourth Amendment claim. *See Baker*, 443 U.S. at 142-43 (1979) (interpreting § 1983 false imprisonment claim as grounded in Fourth Amendment rights); *Groman*, 47 F.3d at 636 (same). Although we recognize the possibility that some false arrest claims might be subject to a due process analysis, we also conclude that this record could not support a due process claim.

Our analysis of Berg's Fourth Amendment claim is a three-step process. First, we must determine whether he was seized for Fourth Amendment purposes. If so, we next determine whether that seizure violated the Fourth Amendment's prohibition against unreasonable seizures. Finally, if there has been a Fourth Amendment violation,

we must determine which of the defendants, if any, may be held liable for it.

III. Fourth Amendment Seizures

A person is seized for Fourth Amendment purposes only if he is detained by means intentionally applied to terminate his freedom of movement. A seizure occurs even when an unintended person is the object of detention, so long as the means of detention are intentionally applied to that person. *See Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (citing *Hill v. California*, 401 U.S. 797, 802-05 (1971)); *see also Medeiros v. O'Connell*, 150 F.3d 164, 169 (2d Cir. 1998); *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991), *cert. denied*, 502 U.S. 1097 (1992); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 796 (1st Cir. 1990).

For example, if a police officer fires his gun at a fleeing robbery suspect and the bullet inadvertently strikes an innocent bystander, there has been no Fourth Amendment seizure. *See Medeiros*, 150 F.3d at 168-69; *Rucker*, 946 F.2d at 281; *Landol-Rivera*, 906 F.2d at 795. If, on the other hand, the officer fires his gun directly at the innocent bystander in the mistaken belief that the bystander is the robber, then a Fourth Amendment seizure has occurred. *See Brower*, 489 U.S. at 596 (citing *Hill v. California*, 401 U.S. 797, 802-05 (1971)).

Applying that law to these facts, there is no doubt that Berg's arrest constituted a seizure for Fourth Amendment purposes. Even if Wolfgang had thought he was arresting Banks, his intentional application of control over the person of Berg would be a Fourth Amendment

seizure. Here, however, Wolfgang knew he was arresting Berg rather than Banks, and clearly intended to do so, even though motivated by an erroneous warrant. The question, then, is whether the arrest violated the Fourth Amendment.

The Fourth Amendment prohibits arrests without probable cause. *See Orsatti v. New Jersey State Police*, 71 F.3d 480, 482 (3d Cir. 1995). As previously noted, the District Court concluded that the warrant for Berg's arrest was facially valid and that it therefore supplied probable cause to arrest him. *See Berg v. County of Allegheny*, No. 97-928, slip op. at 4-7 (W.D. Pa. Sept. 22, 1998) (Wolfgang); *Berg v. County of Allegheny*, No. 97-928, slip op. at 4-5 (W.D. Pa. Sept. 23, 1998) (remaining defendants). We cannot agree.

The Supreme Court's decision in *Whiteley v. Warden*, 401 U.S. 560 (1971), as well as our own subsequent decisions, make clear that an erroneously issued warrant cannot provide probable cause for an arrest. In *Whiteley*, a county sheriff obtained a warrant for Whiteley's arrest based on a conclusory complaint. Police officers in another jurisdiction arrested Whiteley, discovering evidence later introduced at his trial. The state argued that because the arresting officers were unaware of the defect in the warrant, they had probable cause to arrest whether or not the sheriff did. But the Supreme Court held that the arrest was unconstitutional and ordered the evidence excluded:

> Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite

> to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.

Id. at 568. As in *Whiteley*, Constable Wolfgang relied on an arrest warrant, assuming it had been issued after presentation to a judge of evidence sufficient to establish probable cause.[4] Also as in *Whiteley*, "the contrary turn[ed] out to be true"; neither Gardner, Demko, nor anyone else associated with the creation of the warrant had probable cause to arrest Berg.

In *United States v. Hensley*, 469 U.S. 221 (1985), the Court, relying primarily on *Whiteley*, held that police may conduct a *Terry* stop based on a flyer issued by other officers, but "[i]f the flyer has been issued in the absence of a reasonable suspicion, then a stop in the objective

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[4] The Court of Appeals for the Second Circuit, without discussion of *Whiteley*, has upheld an arrest based on a warrant later found to have been improperly issued. *See United States v. Towne*, 870 F.2d 880, 884-85 (2d Cir. 1989), *cert. denied*, 490 U.S. 1101 (1989); *see also United States v. Shareef*, 100 F.3d 1491, 1505 (10th Cir. 1996) (upholding the constitutionality of a *Terry* stop based on good-faith reliance on inaccurate information provided by other law enforcement officials); *United States v. De Leon-Reyna*, 930 F.2d 396, 401 (5th Cir. 1991) (en banc) (per curiam) (same). Other courts, relying on *Whiteley*, have continued to hold that an improperly issued warrant cannot provide probable cause for an arrest. *See United States v. Meade*, 110 F.3d 190, 193-94 & 194 n.2 (1st Cir. 1997); *Ott v. State*, 600 A.2d 111, 115 (Md. 1992); *State v. Taylor*, 621 A.2d 1252, 1254 (R.I. 1993). The Supreme Court's subsequent decisions, as well as our own, convince us that *Whiteley* remains the governing law.

reliance upon it violates the Fourth Amendment." *Id.* at 232. In *Arizona v. Evans*, 514 U.S. 1 (1995), the Court held that the policies underlying the exclusionary rule do not require suppression of evidence seized pursuant to an erroneous warrant resulting from a clerical error. But the Court also noted that *Whiteley* "clearly retains relevance in determining whether police officers have violated the Fourth Amendment." *Id.* at 13. Thus, the Supreme Court has made clear that a mistakenly issued or executed warrant cannot provide probable cause for an arrest.

Our cases have applied the same principle. In *Rogers v. Powell*, 120 F.3d 446 (3d Cir. 1997), a county probation officer told one state trooper that a second state trooper had reported that a warrant existed for Roger's arrest. Relying on the probation officer's representation that a warrant existed, the first state trooper arrested Rogers the following day. In fact, however, there was no such warrant and Rogers filed a § 1983 action for violation of his Fourth and Fourteenth Amendment rights.

Like defendants here, the *Rogers* defendants argued that the arresting officer's "mistaken belief that an arrest warrant had issued for Rogers supplied the probable cause required by the Fourth Amendment." *Id.* at 452-53. We rejected this argument, holding that "[t]he legality of a seizure based solely on statements issued by fellow officers depends on whether the officers who issued the statements possessed the requisite basis to seize the suspect." *Id.* at 453 (citing *Hensley*, 469 U.S. at 231). Because "neither [the trooper] nor [the probation officer] had knowledge of the requisite facts and circumstances necessary to support a finding of probable cause," we concluded the arrest violated the Fourth Amendment. *Id.* We

similarly rejected the argument that reliance on a mistakenly issued warrant can supply probable cause in *United States v. Miles*, 468 F.2d 482, 487-88 (3d Cir. 1972), and *United States v. Bianco*, 189 F.2d 716, 719 (3d Cir. 1951).

The only potentially distinguishing feature of Berg's arrest is that the mistake here was made by a court clerk, rather than a police officer. We do not believe this distinction is significant, however. The Fourth Amendment provides: "[N]o Warrants shall issue, but upon probable cause. ... . " U.S. Const. amend. IV. Because the courts are the arm of government charged with issuing warrants, we believe this requirement is directed to court officials as well as law enforcement officers. This reading is supported by the case law. In *Arizona v. Evans*, the Supreme Court did not find it significant that the unlawful arrest was occasioned by the mistake of court clerk, as opposed to a police officer. *See* 514 U.S. at 13-15.[5] Similarly, in *Rogers*, the arresting officers relied on a probation officer's statement that another trooper had said a warrant existed for Rogers' arrest, yet we held the arrest unconstitutional without inquiring whether the mistake was the trooper's or the probation officer's. *See* 120 F.3d at 452-55; *see also Murray v. City of Chicago*, 634 F.2d 365, 366 (7th Cir. 1980) (holding that although it was unclear whether the police department or clerk's office had failed to transmit an order

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[5] The Court did recognize that court personnel are not "adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime" and therefore application of the exclusionary rule is unlikely to alter their behavior. *Id.* at 15. But this determination is not relevant to an assessment of whether their mistakes can provide probable cause for an arrest.

quashing a warrant, "[i]t seems clear that [plaintiff] sustained a violation of constitutional rights by being arrested and detained pursuant to an invalid warrant").

Because the government officials who issued the warrant here did not have probable cause to arrest Berg, the arrest violated the Fourth Amendment. Accordingly, summary judgment should not have been granted based on the existence of the warrant.[6]

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[6] Unlike defendants, we do not read *Baker v. McCollan*, 443 U.S. 137 (1979) to hold otherwise. When he was arrested, McCollan's brother claimed to be McCollan, presenting McCollan's identification. After his brother violated parole, McCollan was arrested on a warrant and spent a long New Year's weekend in jail. The Court found no constitutional violation, but the substance of McCollan's claim was different from Berg's:

> [R]espondent makes clear that his § 1983 claim was based solely on Sheriff Baker's actions after respondent was incarcerated. . . .
>
> . . . Absent an attack on the validity of the warrant under which he was arrested, respondent's complaint is simply that despite his protests of mistaken identity, he was detained [over the long weekend]. Whatever claims this situation might give rise to under state tort law, we think it gives rise to no claim under the United States Constitution.

Id. at 143-44. Unlike McCollan, Berg challenges the generation and execution of the warrant for his arrest, not the decision to incarcerate him after arrest. At issue here is not whether authorities must investigate the claims of innocence of a person who has been legally arrested but what precautions the Constitution requires before an arrest warrant is issued and executed. *See Murray*, 634 F.2d at 367 (distinguishing *Baker* on the same ground).

IV. Liability of the Individual Defendants

Absent immunity or an adequate defense, a person who, acting under color of state law, directly and intentionally applies the means by which another is seized in violation of the Fourth Amendment can be held liable under § 1983. As a general rule, a government official's liability for causing an arrest is the same as for carrying it out. *See Gordon v. Degelmann*, 29 F.3d 295, 298 (7th Cir. 1994); *see also Kilbourn v. Thompson*, 103 U.S. 168, 200 (1880) (holding that legislators directing an arrest are as responsible as those who effected arrest). As the Supreme Court has explained, § 1983 anticipates that an individual will be "responsible for the natural consequences of his actions." *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986) (holding that a police officer who obtains an arrest warrant without probable cause is liable under § 1983 even though another officer made the actual arrest). It is thus clear that § 1983 liability for an unlawful arrest can extend beyond the arresting officer to other officials whose intentional actions set the arresting officer in motion. We turn, then, to the issue of which, if any, of the defendants in this case can be held liable for Berg's unconstitutional arrest.

A. Constable Wolfgang

Constable Wolfgang contends that he is entitled to qualified immunity from suit because he executed a facially valid warrant. Unless historical facts are in dispute, qualified immunity is a matter for the court. *See id.* at 828. The inquiry is an objective one; the arresting officer's subjective beliefs about the existence of probable

cause are not relevant. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987). In considering claims of qualified immunity, courts are sensitive to "[t]he broad range of reasonable professional judgment accorded" law enforcement officials in the § 1983 context. *Greene v. Reeves*, 80 F.3d 1101, 1107 (6th Cir. 1996). Thus, "the qualified immunity doctrine 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Orsatti*, 71 F.3d at 484 (quoting *Malley v. Briggs*, 475 U.S. 335, 345 (1986)).

A government official is entitled to qualified immunity if his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In the context of this case, the question is whether "a reasonable officer could have believed that his or her conduct was lawful, in light of the clearly established law and the information in the officer's possession." *Sharrar v. Felsing*, 128 F.3d 810, 826 (3d Cir. 1997) (citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Our inquiry, then, has two parts. Did Wolfgang's conduct violate clearly established law? If so, did he nevertheless reasonably believe that his conduct was lawful in light of the information he possessed at the time?

At the time of Berg's arrest in 1994, it was clear that an arrest could be made only with probable cause. Although *Rogers* was decided in 1997, *Whiteley* clearly established in 1971 the conditions under which an arresting officer can obtain probable cause from a warrant. As we have already noted, the warrant at issue in this case did not provide probable cause to arrest Berg. Therefore,

we must consider whether a reasonable constable in Wolfgang's position could have concluded that there was probable cause to arrest Berg based on the information Wolfgang had at the time.

Ordinarily, it is reasonable for an officer to assume that a warrant has been issued for probable cause. As the Supreme Court explained in *Baker*,

> Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent.

443 U.S. at 145-46. Therefore, we have generally extended immunity to an officer who makes an arrest based on an objectively reasonable belief that there is a valid warrant. *See Rogers*, 120 F.3d at 456 (concluding that a state trooper who was inaccurately told by another trooper that there was a warrant for the plaintiff's arrest was immune from suit); *Capone v. Marinelli*, 868 F.2d 102, 105-06 (3d Cir. 1989) (holding that arresting officers were immune in light of a bulletin correctly reporting the existence of an arrest warrant "as well as the nature of the alleged offenses [including child kidnaping] and the fact that a young child was in possible danger"); *cf. Groman v. Township of Manalapan*, 47 F.3d 628, 635 n.10 (3d Cir. 1995) (affirming summary judgment in favor of officers who arrested plaintiff after being told by another officer that plaintiff had assaulted her). Other courts of appeals have adopted the same rule. *See Pickens v. Hollowell*, 59 F.3d

1203, 1207-08 (11th Cir. 1995); *Salmon v. Schwarz*, 948 F.2d 1131, 1140-41 (10th Cir. 1991); *Bennett v. City of Grand Prairie, Tex.*, 883 F.2d 400, 408 (5th Cir. 1989); *Barr v. Abrams*, 810 F.2d 358, 362 (2d Cir. 1987). *But see Ruehman v. Sheahan*, 34 F.3d 525, 527 (7th Cir. 1994) (dicta) (questioning whether officers who arrested plaintiff based on an inaccurate computer report of an outstanding warrant were protected by qualified immunity).

Nevertheless, an apparently valid warrant does not render an officer immune from suit if his reliance on it is unreasonable in light of the relevant circumstances. Such circumstances include, but are not limited to, other information that the officer possesses or to which he has reasonable access, and whether failing to make an immediate arrest creates a public threat or danger of flight. *See Malley*, 475 U.S. at 345 (holding that where a police office submits an affidavit in support of a warrant request, and a reviewing magistrate's concludes that the affidavit establishes probable cause, the officer is not immune from a § 1983 lawsuit if "a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause. . . . "); *see also Yancey v. Carroll County*, 876 F.2d 1238, 1243 (6th Cir. 1989) (holding that "[p]olice officers are entitled to rely on a judicially secured warrant for immunity from a § 1983 action for illegal search and seizure unless the warrant is so lacking in indicia of probable cause, that official belief in the existence of probable cause is unreasonable.").

At the summary judgment stage here, Berg submitted a report from Alan Springer, a Pennsylvania Constable, who concluded "it was not objectively reasonable for Mr. Wolfgang to believe that probable cause existed for the

arrest of Mr. Berg" under the circumstances. According to Springer, the relevant circumstances included the age of the warrant, the invalid address, Berg's socio-economic status, Berg's documentation that he had completed his probation, Berg's cooperativeness, the fact that Berg had a driver's license despite allegedly being on parole for DUI, the fact that Berg did not flee or ask his guests to leave despite having ample warning of Wolfgang's arrival, and the nonviolent nature of the crime. Springer stated that Wolfgang should have waited until the probation office re-opened on January 3, 1995 so he could look into Berg's claims. He also opined that Wolfgang had been "predisposed to arrest Mr. Berg" to earn his fee, particularly after such a large investment of time.

We think Springer's report raises valid questions concerning the reasonableness of Wolfgang's conduct in this case. Because the District Court concluded that Berg's arrest had not been unconstitutional, it did not reach Wolfgang's qualified immunity claim. Consequently, it did not make the findings of fact necessary to determine, as a matter of law, whether Wolfgang's reliance on the warrant was unreasonable under the circumstances with which he was confronted. Therefore, we will remand the cause so that the District Court can make the necessary findings, and can consider the qualified immunity issue in the first instance.

B. Demko

To avoid summary judgment under a Fourth Amendment analysis, Berg must point to some evidence from which a reasonable jury could conclude that Demko

intentionally caused his arrest. He has failed to do so. In fact, Berg concedes that Demko failed to notice that her computer screen displayed his name, rather than Banks', when she mistakenly transposed the criminal complaint number on the Warrant Information Request Sheet. *See* Appellant's Br. at 7 ("She also failed to note that all of the other information on her computer screen, i.e. the arrestee's name, his date of birth, his criminal complaint number, his social security number and the reason for his arrest, was also incorrect."). Nevertheless, Berg contends that Demko could be held liable under a due process theory of deliberate indifference.

Where a defendant does not intentionally cause the plaintiff to be seized, but is nonetheless responsible for the seizure, it may be that a due process "deliberate indifference" rather than a Fourth Amendment analysis is appropriate. *See County of Sacramento v. Lewis*, 523 U.S. 823, 843-44 (1998) (holding that if there is no seizure, the case is not covered by the Fourth Amendment and therefore due process analysis may be appropriate). We need not decide that here, however, because Berg has not alleged anything more than mere negligence on Demko's part. Negligence by public officials is not actionable as a due process violation. *See Daniels v. Williams*, 474 U.S. 327 (1986); *Colburn v. Upper Darby Township*, 946 F.2d 1017 (3d Cir. 1991). Whether or not she should have noticed the additional discrepancies between the information displayed on her computer screen and what appeared on the Information sheet, the fact remains that she did not.

Berg claims, however, that Demko acted with deliberate indifference because she failed to take any steps to recall the erroneously issued warrant when Gardner

"informed her of [her mistake] on August 16, 1994." Appellant's Br. at 25. The record does not support Berg's argument. When Gardner called Demko on August 16, he merely informed her that no warrant for Banks had been issued. *See* Gardner Dep. at 116:9-14 (App.372). He did not inform her that she had issued an erroneous warrant until approximately January 3, 1995, several days after Berg had been arrested. *See* Appellant's Br. at 11 (citing App.603). By that time, it was obviously too late to recall the warrant before it was executed. There is nothing in the record indicating that Demko was aware of her error at any earlier date. She could not have been deliberately indifferent to a risk of which she was reasonably unaware. Therefore, we will affirm summary judgment in favor of Demko.

C. Gardner

As with Demko, Berg points to no record evidence that Gardner intentionally caused his arrest. Though Gardner initiated the series of events that ultimately led to Berg's arrest, his only role was to request a warrant for Banks. He played no part in issuing the erroneous warrant for Berg. Neither did he play any part in Wolfgang's execution of that warrant. In short, there is nothing in this record suggesting that Gardner ever intended to cause Berg's arrest. His only intention was to cause Banks' arrest.

By way of rough analogy, Gardner's warrant request is analogous to the stray bullets at issue in *Medeiros*, *Rucker*, and *Landol-Rivera*. Gardner "fired" the warrant at Banks, and it inadvertently "struck" Berg instead. This is

not the intentional application of the means of detention required for a Fourth Amendment seizure.

Again, however, Berg argues that Gardner could be held liable under a due process theory of deliberate indifference. He contends that Gardner displayed such indifference when he failed "to act on his 'hunch' that perhaps an erroneous warrant did, in fact, issue." Appellant's Br. at 8. It is worth noting, however, that the record does not establish any such "hunch" on Gardner's part. Asked at deposition to recall his thoughts on a particular day more than three years in the past, Gardner was only willing to *assume* that:

> based upon the way I try and perform my job, that it occurred to me that the warrant – there was no warrant issued, that the warrant may have not taken in the computer or that there was a possibility that a bad warrant had been issued.

Gardner Dep. at 151:16-20 (A.407); *see also id.* at 140:4-8 (A.396).

Even assuming, for summary judgment purposes, that Gardner did realize a bad warrant may have issued, his uncontradicted testimony establishes that he believed there was simply no reasonable way to investigate his suspicion. While the term deliberate indifference is generally defined to require only knowledge of a serious risk of harm, *see Fuentes v. Wagner*, 206 F.3d 335, 345 n.12 (3d Cir. 2000) (defining deliberate indifference in the context of a prisoner's Eighth Amendment claim), it also implies a failure to take reasonably available measures to reduce or eliminate that risk. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (holding that "a prison official may be held

liable under the Eighth Amendment . . . only if he knows that inmates face a substantial risk of serious harm and disregards that risk *by failing to take reasonable measures to abate it.*") (emphasis added). Where no reasonable measures exist, neither can deliberate indifference. As with Demko, we will affirm summary judgment in favor of Gardner.

V. Municipal Liability

Allegheny County cannot be held liable for the unconstitutional acts of its employees on a theory of respondeat superior. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978). Instead, Berg must demonstrate that the violation of his rights was caused by either a policy or a custom of the municipality. *See Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996).

Berg contends that he was arrested as a result of Allegheny County's "flawed warrant creation practice" and poor training procedures. As noted, the Integrated Court Information System generates a warrant based on a single datum – the criminal complaint number of the person to be arrested. Because the user enters no other information, there is no check in the computer system to guard against the kind of mistake Demko made. Nor are there procedures that would allow a probation officer such as Gardner who suspects an error to confirm that suspicion. These flaws, Berg maintains, caused his unlawful arrest.

"Policy is made when a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or

edict." *Kneipp v. Tedder*, 95 F.3d 1199, 1212 (3d Cir. 1996) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) (plurality opinion)) (alteration in original, other internal quotation marks omitted). Customs are " 'practices of state officials . . . so permanent and well settled' as to virtually constitute law." *Id.* (quoting *Monell*, 436 U.S. at 691) (other internal quotation marks omitted). Both Demko and Gardner made it clear that there is an established and predictable procedure for issuing warrants and the County has not claimed that the method used in Berg's case differed from any other – apart from the obvious aberration. To the contrary, in its answer to the complaint, the County conceded that Demko "followed the practices and procedures which had been in effect at the time she started working." Answer, ¶ 8. We believe it is a more than reasonable inference to suppose that a system responsible for issuing 6,000 warrants a year would be the product of a decision maker's action or acquiescence. *See, e.g., Beck*, 89 F.3d at 973 ("written complaints were sufficient for a reasonable jury to infer that Chief of Police of Pittsburgh and his department knew or should have known" of officer's violent behavior); *Silva v. Worden*, 130 F.3d 26, 31 (1st Cir. 1997) (stating custom is demonstrated by showing "practice is so well settled and widespread that the policymaking officials have either actual or constructive knowledge of it"). Thus, we hold that there is sufficient evidence that the procedure was a policy or custom of the County's.

Once a § 1983 plaintiff identifies a municipal policy or custom, he must "demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Board of County Comm'rs of*

Bryan County v. Brown, 520 U.S. 397, 404 (1997). If, as here, the policy or custom does not facially violate federal law, causation can be established only by "demonstrat[ing] that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice." *Id.* at 407 (citations omitted); *see also City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989).

Failure to adequately screen or train municipal employees can ordinarily be considered deliberate indifference only where the failure has caused a pattern of violations. *See Bryan County*, 520 U.S. at 408-09. Although it is possible to maintain a claim of failure to train without demonstrating such a pattern, the *Bryan County* Court made clear that the burden on the plaintiff in such a case is high:

> In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice.

Id. at 409. The Court has stated that an example of deliberate indifference to an obvious risk is arming officers without training them "in the constitutional limitations on the use [of the arms.]" *Canton*, 489 U.S. at 390 n.10.

Berg contends the County is liable because of its failure to provide sufficient procedural or technical safeguards against errors such as the one that resulted in Berg's arrest. We have previously applied the Supreme Court's rulings in failure-to-train cases to other claims of liability through inaction, *see, e.g., Beck*, 89 F.3d at 972; *Williams v. Borough of West Chester Pennsylvania*, 891 F.2d 458, 467 n. 14 (3d Cir. 1989), and we do so here as well.

The record contains no evidence of procedures guarding against Demko's mistake. Expressing considerable knowledge of the warrant-issuing procedures, Gardner testified that he knew of no "double check" to ensure that warrants were issued in the correct name. Nor was Gardner aware of any procedure by which he could check to ascertain if an erroneous warrant had issued. Having employed a design where the slip of a finger could result in wrongful arrest and imprisonment, there remains an issue of fact whether the County was deliberately indifferent to an obvious risk. The County's failure to provide protective measures and fail safes against Demko's mistake seems comparable to "a failure to equip law enforcement officers with specific tools to handle recurring situations." *Bryan County*, 520 U.S. at 409. When such a simple mistake can so obviously lead to a constitutional violation, we cannot hold that the municipality was not deliberately indifferent to the risk as a matter of law. Accordingly, the County may be liable under *Monell*.

We will reverse the District Court's grant of summary judgment to the County so that a fact finder may address these questions.[7]

VI. Future Violations

It is clear we have entered an age in which law enforcement personnel will rely increasingly on computer technology. Dissenting in *Arizona v. Evans*, Justice Ginsburg noted,

> Widespread reliance on computers to store and convey information generates, along with manifold benefits, new possibilities of error, due to both computer malfunctions and operator mistakes. . . . [C]omputerization greatly amplifies an error's effect, and correspondingly intensifies the need for prompt correction; for inaccurate data can infect not only one agency, but the many agencies that share access to the database.

514 U.S. at 26 (Ginsburg, J., dissenting). Similarly, Justice O'Connor emphasized,

> In recent years, we have witnessed the advent of powerful, computer-based recordkeeping systems that facilitate arrests in ways that have never before been possible. The police, of course, are entitled to enjoy the substantial advantages this technology confers. They may

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[7] Demko and Gardner intended to arrest Banks. But the County intended that the individuals identified by the warrant-issuing system be arrested. In this case, the person was Berg. Thus the County intentionally seized Berg through means it intentionally applied.

> not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities.

Id. at 17-18 (O'Connor, J., concurring). We would add that widespread computerization carries with it the ability and responsibility to institute more effective safeguards against human error than existed in the past.

The *Bryan County* Court noted that no pattern of violations would be necessary to show deliberate indifference where it was obvious that a policy or custom would lead to constitutional violations. What is obvious in the field of technology is determined under an evolving standard. In this case, Allegheny County may have been liable for Raymond Berg's arrest through deliberate indifference to the obvious danger of such an arrest. Whether or not Allegheny County is ultimately found to have been deliberately indifferent in this case, this tragedy will never again be novel. Allegheny County is on notice of ICIS's shortcomings and at least one of the dangers of using compartmentalized computer systems without viable fail safes.

VII. Conclusions

For the reasons given, the judgment of the District Court will be affirmed as to Defendants Gardner and Demko and reversed as to Defendants Wolfgang and Allegheny County. We will remand for further proceedings consistent with this opinion.

MANSMANN, *Circuit Judge,* concurring in part and dissenting in part.

I respectfully concur in all parts of the court's opinion except Part IV. In Part IV, I differ only with respect to defendants Demko and Gardner, which the majority addresses in subparts B and C, respectively. I would reverse this portion of the District Court's summary judgment and remand because, in my view, there remains a genuine issue of material fact as to each of these defendants.

I take issue with the court's conclusion that Demko did not intend to cause Berg's seizure. First, Demko's state of mind at the time she processed the warrant is not clear on this record. Demko's statement that "Berg and Bank, I'm sorry, looked very close to me," could be read in two different ways. She could have meant that the name "Berg" looked so similar to the name "Banks" that she did not notice the wrong name was on the screen. Alternatively, she could have meant that she knew Berg's name appeared on the screen rather than Banks', but assumed the error was in the warrant request, not the computer system. In other words, Demko could have concluded that Gardner had intended to request a warrant for Berg, but inadvertently wrote down Banks' name instead. Thus, Demko's state of mind remains a jury question.

In addition, even if we assume that Demko did not notice discrepancies between the information displayed on the screen and what appeared on the information sheet at the time she typed in the data, in the aftermath of the error, her actions may well display deliberate indifference. On April 16, Gardner informed Demko that the information sheet had been processed, but there was not any warrant for Banks. She merely generated one. She

did not make any effort to identify the prior incorrect warrant or to retrieve it, though she could surmise that a warrant had been generated improperly and that someone might be wrongfully arrested. Though the court finds that Demko was reasonably unaware of the risk, this too is a jury question. Although Demko had not expressly stated that she realized the possibility of an erroneous warrant, reckless disregard may be predicated on knowledge of facts from which an unreasonable risk of a constitutional violation may be inferred. Surely a jury could find that Demko had sufficient information to determine that she had probably generated a warrant for someone else.

At the summary judgment stage, all reasonable inferences must be drawn in favor of the non-moving party. *See International Union v. Skinner Engine Co.*, 188 F.3d 130, 137 (3d Cir. 1999) (citing *Peters v. Delaware River Port. Auth.*, 16 F.3d 1346, 1349 (3d Cir. 1994)). It would be reasonable to infer from Demko's deposition testimony that she knew Berg's name had come up on the computer screen while the warrant request was for Banks. Similarly, it would be reasonable to infer that as of April 16, Demko knew that an error had been made and yet did nothing to try to correct it, though someone might be wrongfully imprisoned.

As to the defendant Gardner, my disagreement with the majority stems from interpreting Gardner's actions after he realized that the warrant he had requested for Banks had not been issued. He apparently did not make any effort to try to halt the error though he could surmise that a warrant had been generated for someone other

than Banks, and that someone might be wrongfully arrested.

As the majority notes, for summary judgment purposes we may assume that Gardner realized that an erroneous warrant may have issued. The majority is satisfied, however, "that he believed there was simply no reasonable way to investigate his suspicion." Under *Farmer*, 511 U.S. at 847, Gardner might have exhibited deliberate indifference if he failed to take reasonable measures to abate a substantial risk of serious harm. When done mistakenly, being thrown into prison and deprived of one's liberty is serious harm. Thus, the reasonableness of the measures available to Gardner in light of the relevant circumstances is a jury question. Where the risk of harm is as weighty as it is in this case, greater measures might well be required to avoid it. For example, a jury could plausibly find that once Gardner realized or thought that a mistake might have occurred, he should have made even the most painstaking attempts to uncover the error and if possible, discover the identity of the individual in whose name the erroneous warrant had been issued. I thus disagree with the majority's conclusion that Gardner neither played a part in issuing the erroneous warrant for Berg nor did he play any part in Wolfgang's warrant. On the contrary, Gardner was "involved" in the issuance of the warrant and in Berg's subsequent arrest. He initiated the request that resulted in the erroneous warrant, and as supervisor of the responsible agency, chose not to correct the error.

Because it is feasible, if not most likely, that a jury would hold Demko and/or Gardner accountable to Berg for his wrongful imprisonment, I would reverse summary

judgment for Demko and Gardner and remand the case for trial.

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3557

RAYMOND A. BERG, JR.,

Appellant

v.

COUNTY OF ALLEGHENY; ALLEGHENY COUNTY ADULT PROBATION SERVICES; DEBBIE BENTON; RICHARD R. GARDNER; GLENN ALLEN WOLFGANG; GINNY DEMKO

On Appeal from the United States District Court for the Western District of Pennsylvania D.C. Civil Action No. 97-cv-00928
(Honorable Donetta W. Ambrose)

Argued March 10, 1999

Before: MANSMANN, SCIRICA and NYGAARD,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was argued on march 10, 1999. On consideration whereof, it is now **ORDERED** and **ADJUDGED** by this court that the order of the said District Court entered September 23, 1998, be affirmed as

to Defendants Gardner and Demko and reversed as to Defendants Wolfgang and Allegheny County. We will remand for further proceedings consistent with this opinion. Each party to bear their own costs.

IT IS SO ORDERED.

Attest:

/s/ Marcia M. Waldron
Acting Clerk

DATED: July 17, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3557

Raymond A. Berg, Jr.,

Appellant

v.

County of Allegheny, et al.

Present: NYGAARD, *Circuit Judge*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until November 15, 2000.

/s/ Nygaard
Circuit Judge

Dated: AUG 31 2000
lmc/cc: AJC
TEB
ENA
SGD

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RAYMOND A. BERG, JR.,	)	
Plaintiff	)	
-vs-	)	Civil Action
COUNTY OF ALLEGHENY, ALLEGHENY COUNTY ADULT PROBATION SERVICES, RICHARD A. GARDNER, GLENN ALLEN WOLFGANG and GINNY DEMKO	)	No. 97-928
Defendants.	)	

AMBROSE, District Judge.

OPINION
AND
ORDER OF COURT

Plaintiff Raymond A. Berg ("Berg") initiated this action against Allegheny County, Allegheny County Adult Probation Services, Richard Gardner, Ginny Demko ("the County Defendants") and Glenn Wolfgang, for civil rights violations arising from an erroneous arrest. Briefly, Berg, who had successfully completed his parole requirements related to a DUI charge, was rearrested on December 30, 1994, when a clerk inadvertently transposed two digits of a "Criminal Complaint Number." The warrant originally requested was for a Paul Banks. Berg was incarcerated for several days until the error was corrected.

Pending is a Motion for Summary Judgment filed by the County Defendants (Docket No. 24). The County Defendants offer several contentions in support of their Motion: (1) insufficient evidence of a practice, policy or custom which amounted to a violation of Berg's rights; (2) Ginny Demko is entitled to qualified immunity; (3) there is no evidence that Richard Gardner acted in any manner which resulted in a violation of Berg's rights; and (3) [sic] Ginny Demko's conduct amounted to mere negligence.[1]

Berg opposes the Motion. Berg's Brief in Opposition deserves some mention. Berg makes no attempt to set forth any legal analysis whatsoever. Presumably, he seeks redress for alleged false arrest and unlawful imprisonment under 42 U.S.C. § 1983. Yet his Brief is devoid of *any* mention of the standard governing every § 1983 claim – that the defendants deprived him of a federal right while acting under color of state law. Additionally, with respect to his claims against the County, Berg fails entirely to allege, much less demonstrate, that the County acted pursuant to a custom, practice or policy. He makes no mention of the elements necessary to establish a *prima facie* case for each claim. Nor does he make any effort to demonstrate how record evidence satisfies each element. Finally, Berg manages to draft responses ostensibly addressing each of the County Defendants' arguments,

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[1] The County makes several arguments in support of the entry of judgment against Berg on all claims asserted against Debbie Benton as well. I need not consider such arguments, however, given that Berg has voluntarily withdrawn all claims against Benton.

without ever citing to a single case. Suffice it to say that Berg's Brief in Opposition is woefully inadequate.

After careful consideration, and for the reasons set forth below, the Motion for summary Judgment is granted in its entirety.

STANDARD

Summary judgment may only be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Rule 56 mandates the entry of judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. *International Raw Materials, Ltd. v. Stauffer Chemical Co.*, 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. *Id.* Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing

that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's burden of proof at trial. *Celotex*, 477 U.S. at 322. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. *Id.* at 324.

ANALYSIS

(A). *Absence of an Underlying Constitutional Violation*

Berg asserts essentially the same claims against the County, the Adult Probation Services,[2] Gardner and Demko – "unlawful arrest," and "false imprisonment" – arising under 42 U.S.C. § 1983. To succeed on any of these claims, however, Berg must prove that the Defendants violated a federally protected right. *See Collins v. City of Harker Heights, Texas*, 503 U.S. 1137, 1149 (1992) (stating

---

[2] Counts III and IV of the Amended Complaint assert claims against "Allegheny County Adult Probation Services." While the Probation Services is, indeed, an agency of the county, the Defendants insist that it does not have separate and distinct legal authority. An agency lacking a separate and distinct legal authority cannot be subject to a civil rights suit. *See Irvin v. Borough of Darby*, 937 F. Supp. 446, 450 (E.D. Pa. 1996); *Johnson v. City of Erie*, 834 F. Supp. 873, 878 (W.D. Pa. 1993); and *Agresta v. City of Philadelphia*, 694 F. Supp. 117, 118 (E.D. Pa. 1988). Accordingly, the Defendants seek the dismissal of all claims against the Probation Services. Significantly, Berg does not oppose. Consequently, I direct that judgment be entered against Berg on Counts III and IV.

that "proper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the [municipality] is responsible for that violation.") and *Paratt v. Taylor*, 451 U.S. 527, 535 (1981) (stating that, to establish a § 1983 claim, a plaintiff must demonstrate a violation of a right or privilege secured by the Constitution or other federal laws, and that the violation was committed by a person acting under color of state law).

The County Defendants' Brief is limited to addressing *responsibility* for the violation; it does not touch upon whether or not a violation, in fact, occurred. In disposing of Wolfgang's Motion for Summary Judgment, however, I determined that Berg was not deprived of an underlying federally protected right. For the sake of consistency, then, I direct that judgment be entered in favor of the County Defendants, and against Berg, on all claims asserted against them.

(B) *Lack of Custom, Practice or Policy – County*

Though I need not address this argument, given that Berg has failed to prove the violation of a constitutional right, it may be resolved quickly. It is well established that, as against the County, Berg must prove the existence of a custom, policy or practice, that caused the constitutional violation. *See Monnell v. Dept. of Social Services*, 436 U.S. 658, 694-95 (1978). Yet nowhere in his Brief in Opposition does Berg reference a custom, practice or policy.

Berg does make an oblique reference to a "failure to train":

> [W]hen questioned about a fail-safe system for the computer which she utilized, Defendant Demko was totally unaware as to how to respond to this line of questioning, which leads one to believe that she had inadequate training and no understanding as to how the computer system worked.

See Docket No. 30, p. 19. "In the absence of an unconstitutional policy, a municipality's failure to properly train its employees and officers can create an actionable violation of a party's constitutional rights under § 1983." *Reitz v. County of Bucks*, 125 F.3d 139, 145 (3d Cir. 1997), *citing, City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Presumably, Berg's § 1983 claim against the County is based upon a failure to train.[3]

The Third Circuit court recently reviewed the parameters of a § 1983 failure to train claim:

> . . . this failure to train can serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the municipal employees came into contact . . . Only where a failure to train reflects a deliberate or conscious choice by a municipality – a policy as defined by our prior cases – can a city be liable for such a failure

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[3] Berg does make some mention of the fact that the Probation Office computer system was not accessible by other Departments. However, because Berg makes no attempt to explain how this "failure" translated to a constitutional violation, I will not address this contention.

> under § 1983. . . . the focus in this determination is on the adequacy of the training program in relation to the tasks the particular officers must perform and the connection between the identified deficiency in the municipality's training program and the ultimate injury. . . . To succeed on a § 1983 claim, the party must prove that the training deficiency actually caused the injury . . . . Establishing municipal liability on a failure to train claim under § 1983 is difficult. A plaintiff pressing a § 1983 claim must identify a failure to provide specific training that has a causal nexus with their injuries and must demonstrate that the absence of that specific training can reasonably be said to reflect a deliberate indifference to whether the alleged constitutional deprivation occurred.

Reitz, 125 F.3d at 145 (internal brackets, quotation marks and citations omitted).

Viewed within this framework, Berg's proof is glaringly deficient. Berg has neither identified "the specific training the County should have offered which would have prevented the deprivation of [Berg's] constitutional rights nor established that such training was not provided." *Id.* Nor did Berg produce evidence that "similar conduct [erroneously issuing a warrant] has occurred in the past or that the inactivity or activity occurred specifically because of insufficient training. . . . " *Id.* The *Reitz* court found such deficiencies to warrant the entry of judgment against the plaintiff. I agree with the *Rietz* [sic] court and hereby direct that judgment to be entered in favor of the County and against Berg on Counts I-IV.

(C). *Richard Gardner – Probation Officer*

In Counts VII and VIII of the Amended Complaint, Berg asserts claims of false imprisonment and unlawful arrest, arising under 42 U.S.C. § 1983 against Gardner. Gardner moves for the entry of judgment in his favor on these claims, asserting that Berg has not produced sufficient evidence to establish liability. I agree.[4]

Gardner played a limited role in this terrible mixup. Gardner requested that a warrant be issued for Paul Banks. Demko faxed Gardner a confirmation that the warrant had been issued. In fact, Demko mistakenly issued a warrant for Raymond Berg. Understandably, Gardner was later unable to locate the warrant for Banks, and had to request a new one. He had no involvement in Berg's arrest.

Berg does not contest that Gardner had no active involvement with the issuance of the warrant or the arrest. Rather, Berg's claim (though asserted in the context of "conditional immunity") rests upon Gardner's inaction. In his deposition, Gardner was asked if, at the time he renewed his request, he considered whether a warrant had been issued for the wrong person. He replied that:

> Well, my integrity is extremely important to me and I would be very hesitant to say that for a brief moment I did not consider that that would be a possibility, but hand in hand would be the

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[4] Again, I have already concluded that Berg's claims are not viable for the separate reason that he failed to establish the violation of a constitutional right.

> consideration that the only way I believe I would be able to determine that would be to take five digit numbers and play commutations and permutations endlessly in order to determine that. So that thought kind of goes away rather quickly when you can't find a trail to investigate that would allow you to make a determination.

See Gardner Dep., p. 141-42. Berg simply states that Gardner's failure to follow up constituted a "dereliction of duty." *See* Docket No. 30, p. 14.

This contention, unsupported by an substantive analysis or citation to supporting legal authority, is simply insufficient to withstand the entry of judgment. The uncontradicted evidence establishes that Gardner had no involvement in the issuance of the warrant or in Berg's arrest. Furthermore, uncontradicted evidence establishes that there was no plausible means for Gardner to determine in whose name the first warrant had been erroneously issued. Had Berg proven that there was some reasonable method of revoking the first warrant, and that Gardner nevertheless failed to take such action, the claim would likely go forward. Berg's failure to garner such evidence, however, mandates the entry of judgment against him. Consequently, judgment shall be entered in favor of Gardner, and against Berg, with respect to County VII and VIII.

(D). *Demko – Office Clerk*

In Counts XII and XIII of the Amended Complaint, Berg charges Demko with unlawful arrest and false

imprisonment. Demko caused a warrant to be issued for Berg when she transposed two digits of the Criminal Complaint Number assigned to Paul Banks. Demko testified by way of deposition that the mistake was her first, despite the fact that she had issued over 50,000 warrants. *See* Demko Dep., p. 30, 33.[5]

The County Defendants cite to several cases for the proposition that mere negligence will not support a § 1983 claim. *See* Docket No. 25, p. 19-20, *citing*, *Daniels v. Williams*, 474 U.S. 327 (1986) and *Paul v. Davis*, 424 U.S. 693 (1976). Significantly, Berg does not object to this restatement of the law. Urging that Demko's conduct amounted to nothing more than negligence, the County Defendants demand the entry of judgment against Berg on these claims.

Berg responds that:

> Ms. Demko breached her duty to her office (standard of conduct) as a warrant clerk as well as exhibited extreme ineptitude in fulfilling her role as to the duties of her office when she generated a warrant without judicial approval. . . . Ms. Demko's conduct does contain all the ingredients of wantonness and intentional and deliberate indifference to the constitutional rights of Mr. Berg.

See Docket No. 30, p. 15. "Standard of conduct" and "duty" are negligence concepts. His reliance upon these "breaches" supports the County Defendants' assertions

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[5] Again, I have already held that the claims against Demko are not viable for the separate and independent reason that Berg failed to prove the violation of a constitutional right.

that the conduct complained of constitutes only negligence. While Berg makes passing reference to "wantonness" and "deliberate indifference," he does not provide any substantive analysis. Recitation of key phrases is not enough to withstand a motion for summary judgment. Berg did not elicit any testimony from Demko that she knew of her mistake, and that she failed to take advantage of reasonable methods of correcting the mistake. Had Berg proffered such evidence, the entry of judgment against him may not be appropriate.

In the absence of any such evidence, I agree that reasonable jurors could only find that Demko's conduct, though resulting in a great misfortune, amounted to no more than negligence. Consequently, judgment is entered in favor of Demko, and against Berg, on Counts XII and XIII.

DATE FILED: SEPTEMBER 23, 1998

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RAYMOND A. BERG, JR.,	)	
Plaintiff,	)	
	)	Civil Action
-vs-	)	No. 97-928
COUNTY OF ALLEGHENY, ALLEGHENY COUNTY ADULT PROBATION SERVICES, RICHARD A. GARDNER, GLENN ALLEN WOLFGANG and GINNY DEMKO,	)	
Defendants.	)	

AMBROSE, District Judge

ORDER OF COURT

AND NOW, this **23rd** day of September, 1998, after careful consideration and for the reasons set forth in the accompanying Opinion, it is hereby **ORDERED** that the County Defendant's Motion for Summary Judgment (Docket No. 24) is **GRANTED**. Judgment shall be entered AGAINST Berg, and in FAVOR of the County Defendant's on all claims. Given the entry of judgment against Berg and in favor of Wolfgang, as set forth in the related Opinion and Order, the Clerk of courts is directed to mark this case "Closed."

BY THE COURT:
/s/ Donetta W. Ambrose
Donetta W. Ambrose,
U.S. District Judge

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3557

RAYMOND A. BERG, JR.,

Appellant

v.

COUNTY OF ALLEGHENY; ALLEGHENY COUNTY ADULT PROBATION SERVICES; DEBBIE BENTON; RICHARD R. GARDNER; GLENN ALLEN WOLFGANG; GINNY DEMKO

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civ. No. 97-cv-0928)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO and FUENTES, *Circuit Judges*

The Petition for Panel Rehearing filed [sic] the Appellant, Raymond A. Berg, Jr., in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the Petition for Panel Rehearing is hereby DENIED.

The Petition for Rehearing filed by Appellee Glenn Allen Wolfgang, having been submitted to the judges

who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having having [sic] asked for rehearing as to Appellee Wolfgang, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc as to Appellee Wolfgang, the Petition for Rehearing is hereby DENIED.

The Petition for Rehearing en banc filed by the Appellee County of Allegheny, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing as to Appellee County of Allegheny, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc as to Appellee County of Allegheny, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/ Nygaard
United States
Circuit Judge

Date: AUG 17 2000
lmc/cc: TEB
ENA
AJC
SGD

Arrest Warrant Information Sheet Gardner No. 10

BANKS (Last) PAUL (First) AKA: (Last) (First)

VIOLATION OF PROBATION (THEFT BY UNLAWFUL TAKING)

Judge: HONORABLE Paul F. Lutty Jr. Code: 089

NCIC (Will Extradite)	N	Reason Warrant Issued
Nationwide	N	
Surrounding State Only	N	X 7. Violation of Prob/Parole County
Pennsylvania Only	Y	

DOB: 08-21-70 SS#: 164-56-9753
CC#: 9004165 Sex: M Ht.: 6'01"
OTN: C1367590 Race: W Wt.: 185lbs
BCI: 213698 Eyes: BROWN Hair: BROWN

3551 MARION AVENUE APT#: 3
FINLEYVILLE PA 15332

P.O.#: 199457 DISTRIBUTE TO GINNY DEMKO

P.O. MIKE GOODNACK
Office: HEADQUARTERS
Phone: 392-8320

Richard R. Gardner

RICHARD R. GARDNER
Probation Supervisor

App. 50

No. 00-589

IN THE

Supreme Court of the United States

RAYMOND A. BERG, JR.,

Petitioner,

v.

COUNTY OF ALLEGHENY, ALLEGHENY COUNTY ADULT PROBATION SERVICES, RICHARD R. GARDNER, GLENN ALLEN WOLFGANG, and GINNY DEMKO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT GLENN ALLEN WOLFGANG

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BRIEF OF RESPONDENT GLENN ALLEN WOLFGANG IN OPPOSITION TO THE PETITION OF RAYMOND A. BERG, JR. FOR WRIT OF CERTIORARI

Raymond A. Berg, Jr., plaintiff in the District Court and appellant in the Court of Appeals, seeks your Honorable Court's review of the rulings made by those courts in favor of defendant/appellees Ginny Demko and Richard Gardner, who undoubtedly will oppose Berg's petition.

Respondent Glenn Allan Wolfgang, who is filing a cross-petition for writ of certiorari from the Court of Appeals' decision against him, fails to perceive how the persons who initially produced and procured the arrest warrant for Berg could be excused from liability for Berg's arrest and incarceration, while Wolfgang, the officer who served and executed the facially valid warrant in good faith, could be held liable for their mistakes.

Respectfully submitted,

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No. 00-589

Supreme Court, U.S.
FILED
NOV 14 2000
CLERK

IN THE

Supreme Court of the United States

RAYMOND A. BERG, JR.,

Petitioner,

v.

COUNTY OF ALLEGHENY; ALLEGHENY COUNTY, ADULT PROBATION SERVICES; RICHARD R. GARDNER; GLENN ALLEN WOLFGANG; and GINNY DEMKO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS COUNTY OF ALLEGHENY, RICHARD R. GARDNER AND GINNY DEMKO

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QUESTIONS PRESENTED FOR REVIEW

Pursuant to Supreme Court Rule 15, respondents object to the second question presented by petitioner which question is not before this Court. The averments made therein are not consistent with the proceedings below and states facts not part of the lower court findings in so much as neither the record, nor the findings of the courts below, support the averment that Mr. Gardner knew that an arrest warrant was erroneously issued and ignored same. Petitioner's second question presented states as follows:

> Has petitioner stated a § 1983 civil rights claim for violation of his protections under the Fourth, Fifth and Fourteenth Amendments which should have survived a motion for summary judgment, against Richard R. Gardner, a probation officer, who requested by way of an Arrest Warrant Information Sheet addressed to Ginny Demko, a criminal court clerk, that an arrest warrant be computer generated by her for Paul Banks for violation of his probation when, after determining that an arrest warrant was issued, but not for Paul Banks, then instructed Ginny Demko to issue another computer generated warrant but failed, at the same time, to direct her to retrieve the warrant issued in error and in failing to retrieve the errant warrant himself?

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COUNTERSTATEMENT OF THE CASE

In this Petition for Writ of Certiorari, Raymond A. Berg, Jr., seeks review of a factual determination which has been consistently adjudicated in favor of Respondents, Virginia "Ginny" Demko and Richard R. Gardner, by the United States District Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit.

By Order dated September 23, 1998, the United States District Court for the Western District of Pennsylvania granted summary judgment in favor of the County of Allegheny and its employees, Ms. Demko and Mr. Gardner.[1] By Order dated July 17, 2000, the United States Court of Appeals for the Third Circuit affirmed in part and reversed in part. The Third Circuit affirmed the entries of summary judgment for Ms. Demko and Mr. Gardner, respondents herein. Also in the July 17, 2000, Order, the Third Circuit reversed and remanded for further proceedings, Mr. Berg's claims against the County of Allegheny. Mr. Berg now seeks review of the Third Circuit's affirmance of the summary judgment for Ms. Demko and Mr. Gardner.

Mr. Berg initiated the pending proceedings in an attempt to recover damages for false arrest, false imprisonment and violation of his rights to due process under the United States Constitution and the Fourth, Fifth and Fourteenth Amendments. Mr. Berg's cause of action is based on § 1983 and § 1988 of Title 42 of the United States Code and § 1985(3) of Title 43 of the United States Code.[2]

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1. The United States District Court determined that Allegheny County Adult Probation Services was one in the same as the County of Allegheny. The District Court dismissed Debbie Benton. There was no appeal taken from the dismissal of Debbie Benton.

2. On appeal, Mr. Berg only presses his Section 1983 claim.

It is undisputed that Mr. Gardner and Ms. Demko are state actors and were acting as such at all times relevant to the petitioner's cause of action. It is further undisputed that Mr. Gardner was a supervisor of probation officers employed by the County in the Adult Probation and Parole Department and Ms. Demko was employed at all times as a warrant clerk in the Criminal Division of the Court of Common Pleas of Allegheny County.

On October 30, 1990, Mr. Berg was sentenced to forty-eight hours of rehabilitation treatment pursuant to charges of driving under the influence of alcohol. When Mr. Berg was released on parole, Debbie Benton of the Allegheny County Probation and Parole Office was assigned as his parole officer. Mr. Berg eventually completed his term of parole in May of 1991.

On or about July 14, 1994, Mr. Gardner, a supervisor at the Allegheny County Probation and Parole Office, while reviewing his files, discovered that an individual by the name of Paul Banks was not complying with his probation requirements. Mr. Gardner completed a Warrant Request Form on July 14, 1994, which was signed by the Honorable Paul A. Lutty, Jr., of the Court of Common Pleas, Allegheny County, Pennsylvania. Pursuant to the Order of Judge Lutty, a request for an arrest warrant was issued in the form of a facsimile Arrest Warrant Information Sheet.

Mr. Gardner sent the facsimile Arrest Warrant Information Sheet to Ms. Demko, the warrant clerk responsible for issuing and clearing all arrest warrants in Allegheny County. The Arrest Warrant Information Sheet clearly indicates that Mr. Gardner requested that an arrest warrant be issued for Paul Banks, with criminal complaint

no. 9004165. On August 3, 1994, Ms. Demko generated the warrant using the County's computerized Integrated Court Information System (ICIS). The ICIS is operated by typing a criminal complaint number into the computer, which then automatically retrieves the remaining information and displays it on the user's screen.

Unfortunately, when Ms. Demko initially entered the criminal complaint number of Paul Banks, she inadvertently transposed two digits in Mr. Bank's criminal complaint number. Ms. Demko reversed the digits 4 and 1 so that the information brought up on the computer screen was actually that of the plaintiff, Raymond A. Berg, Jr. His criminal complaint number for his prior arrest was 9001465. Ms. Demko pressed a 1 and a 4 instead of a 4 and a 1 when she entered the criminal complaint number. Being that the names Berg and Banks were so similar, Ms. Demko, in checking the computer screen in her office, inadvertently did not notice the difference in the last names. As conceded by Mr. Berg in the proceedings below, Ms. Demko noticed only that the address on the screen was different from the address on the Information Sheet and did not realize that the other information was different as well. (*See* App. 3). Ms. Demko concluded only that the ICIS contained an old or otherwise incorrect address for Mr. Banks. In an effort to be efficient, she corrected what she believed to be the incorrect address on the warrant. This was the only change she made and a warrant was issued. She did not notice that the birth date, the social security number, the criminal charges, and the probation officer were all different from what appeared on the computer screen for Mr. Berg and what was set forth on the Arrest Warrant Information Sheet.

Mr. Berg lists the information provided on the facsimile Arrest Warrant Information Sheet; however, unlike Mr. Berg's Petition, this information was provided in a much different format. (*See* App 50). An exact copy of Paul Banks' Arrest Warrant Information Sheet is provided in the Appendix at page 50. This shows exactly what Ms. Demko saw and indicates the information was not as readily apparent as Mr. Berg portrays.

The warrant for the arrest of Mr. Berg inadvertently issued by Ms. Demko was forwarded to the Allegheny County Sheriff's Office where it was placed in a file with all of the other outstanding arrest warrants. Ms. Demko then date-stamped the Arrest Warrant Information Sheet for Mr. Banks, pursuant to the policies and procedures in effect at the time of the incident, and sent it back to Mr. Gardner.

Having received the Arrest Warrant Information Sheet with the date stamp on it indicating that it was received and completed by the warrant office in the courthouse, Mr. Gardner assumed that a warrant had been issued for the arrest of Mr. Banks pursuant to his request and the order of Judge Lutty. On August 15, 1994, Mr. Gardner was checking the computer system for the issuance of warrants and discovered that a warrant had not been issued for Paul Banks. He contacted Ginny Demko in the warrant office on August 16, 1994. He advised Ms. Demko that a warrant had not been issued for Mr. Banks. Not knowing that an erroneous warrant had been issued, Mr. Gardner called Ms. Demko on August 16, 1994, and merely informed her that no warrant for Mr. Banks had been issued. Ms. Demko generated a warrant for his arrest on that same date. Mr. Gardner corrected the date on the original Arrest Warrant Information Sheet and initialed it, indicating that a warrant had now been issued for the arrest of Mr. Banks.

Constable Glenn Allen Wolfgang, an independent contractor and a duly elected constable from the Borough of Manor in Westmoreland County, picked up the warrant in the Sheriff's Office and arrested Mr. Berg on December 30, 1994. Mr. Berg was thereafter taken to the Allegheny County Jail and, after proper processing, was placed in the jail. He was released on January 3, 1995.

Mr. Gardner first became aware that Mr. Berg was lodged in the Allegheny County Jail as a probation and parole violator when Peggy Viola, a clerk in the Probation and Parole Office, checked the jail list on January 3, 1995, and noticed that Mr. Berg was being housed in the jail as a result of a violation of a probation/parole warrant. Ms. Viola brought Mr. Berg's case to the attention of Mr. Gardner. Immediately upon checking the system and determining that there was no warrant issued for the arrest of Mr. Berg, Mr. Gardner made arrangements to have Mr. Berg released from jail, which occurred on January 3, 1995. Soon thereafter, he contacted Ms. Demko to advise her that she had issued an erroneous warrant. This was the first time Ms. Demko learned of her mistake.

There is no question that the warrant issued for the arrest of Mr. Berg was a mistake which was the result of Ms. Demko inadvertently reversing the digits 4 and 1 in the criminal complaint number of Mr. Banks. Ms. Demko testified that she has been employed as a warrant clerk since 1989 and that she issues approximately 500 warrants a month, which means that she had issued approximately 55,000 warrants at the time of her deposition on December 17, 1997. During that entire period of time, she was using the same computer system that was in place in August of 1994, when she made the mistake with respect to the warrant issued for

the arrest of Mr. Berg. She testified that this was the only occasion where there was ever a mistake made in the warrant office which resulted in an arrest warrant being issued for someone other than the person for whom it was intended to be issued. Ms. Demko acknowledged she "made a mistake, a clerical mistake," one that had never occurred during the process of issuing over 55,000 warrants and one which has never occurred since this incident.

Mr. Gardner testified that when he first learned of the error on January 3, 1995, he did not think that Ms. Demko could have made the mistake because she was "just too good and too thorough." Mr. Gardner testified that at that time he may have thought that Ms. Demko was on vacation, as it was the summer months, and that her replacement had stamped the Information Sheet but had failed to issue the warrant.

Mr. Gardner, by his deposition, testified repeatedly that he did not know that a warrant had been erroneously issued until January 3, 1995. Mr. Gardner testified that the first time he had notice that a wrong criminal complaint number had been utilized was on or after January 3, 1995. When he contacted Ms. Demko by telephone on August 16, 1994, he only advised her that despite the date stamp on the warrant, the warrant did not appear on the computer system, ICIS. He did not advise Ms. Demko that an erroneous warrant had been issued as he did not know that an erroneous warrant had been issued until much later, January 3, 1995. During Mr. Gardner's deposition, petitioner's counsel inquired of Mr. Gardner, "but you did know that a warrant was issued on that date [August 6, 1994] for someone?" Mr. Gardner responded, "No, I did not. . . . I definitely did not know that a warrant was issued for anyone."

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE THE FACTUAL QUESTIONS RAISED IN THE PETITION PRESENT NO COMPELLING REASONS TO GRANT CERTIORARI.

Petitioner seeks review of a factual determination that has been consistently adjudicated by the District Court and the Third Circuit in favor of Respondents, Ms. Demko and Mr. Gardner. (*See* App. 21, 46). Both the District Court and Third Circuit held that the record did not present sufficient evidence from which reasonable jurors could conclude that Ms. Demko or Mr. Gardner intentionally caused Mr. Berg's arrest or acted with "deliberate indifference." (*See* App. 21, 22, 43-46). Thus, the lower courts clearly held that the evidence of record did not support Due Process or Fourth Amendment claims against Ms. Demko or Mr. Gardner.

It is well settled that unintended conduct cannot form the basis of a Fourth Amendment violation. *Brower v. County of Inyo*, 489 U.S. 593 (1989). In *Brower*, the driver of a stolen automobile was killed at the end of a high speed chase when his vehicle collided with a truck that police had positioned to serve as a roadblock. This Court held that the use of the roadblock constituted a seizure for purposes of the Fourth Amendment. This Court further held that a violation of the Fourth Amendment requires an intentional acquisition of physical control: "In sum, the Fourth Amendment addresses 'misuse of power' . . . not the accidental effects of otherwise lawful conduct." *Brower*, 489 U.S. at 596 (citation omitted).

To avoid summary judgment under the Fourth Amendment analysis, Mr. Berg must point to some evidence

from which a reasonable jury could conclude that respondents intentionally caused his arrest. As held by both the District Court and Third Circuit and supported by the record evidence, he has failed to do so.

In the proceedings below, Berg conceded that Ms. Demko failed to notice that her computer screen displayed his name, rather than Banks', when she mistakenly transposed the criminal complaint number on the Warrant Information Request Sheet. (*See* App. 20). The Third Circuit found this integral to its determination that Ms. Demko did not act intentionally to cause Mr. Berg's arrest.

With respect to Mr. Gardner, the Third Circuit further held that "Berg points to no record evidence that Gardner intentionally caused his arrest." (*See* App. 21). Although Mr. Gardner initiated the series of events that ultimately led to Mr. Berg's arrest, his only role was to request a warrant for Mr. Banks. He did not play any part in issuing the erroneous warrant for Mr. Berg or in the Constable's arrest of Mr. Berg. Nothing in the record indicates that Mr. Gardner intended to cause Mr. Berg's arrest; he only intended to cause Mr. Banks' arrest. (*See* App. 21).

Where a government official acting under the color of law does not intentionally cause the plaintiff to be seized, but is nonetheless responsible for the seizure, it may be that a due process "deliberate indifference" analysis is appropriate. *See County of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1998). The Third Circuit determined that Mr. Berg also failed to show Ms. Demko acted with "deliberate indifference" under the due process analysis. "Berg has not alleged anything more than mere negligence on Demko's part." (*See* App. 20).

Mr. Berg's argument that Ms. Demko and Mr. Gardner acted with "deliberate indifference" is premised on the illusory fact that Ms. Demko and Mr. Gardner *knew* that a warrant was erroneously generated in August of 1994. Mr. Berg similarly raised this argument in the Third Circuit. There, the court clearly held that, on the contrary, the evidence of record, including the depositions of both Ms. Demko and Mr. Gardner, did not present evidence from which a reasonable juror could conclude that either party knew the warrant was erroneously issued. The Third Circuit stated:

> Berg claims, however, that Demko acted with deliberate indifference because she failed to take any steps to recall the erroneously issued warrant when Gardner "informed her of [her mistake] on August 16, 1994." When Gardner called Demko on August 16, he merely informed her that no warrant for Banks had been issued. He did not inform her that she had issued an erroneous warrant until approximately January 3, 1995, several days after Berg had been arrested. . . . *There is nothing in the record indicating that Demko was aware of her error at any earlier date.* She could not have been deliberately indifferent to a risk of which she was reasonably unaware. (*See* App. 20-21) (internal citations omitted) (emphasis added).

Similarly, the District Court stated:

> While Berg makes passing reference to "wantonness" and "deliberate indifference," he does not provide any substantive analysis. . . .

> *Berg did not elicit any testimony from Demko that she knew of her mistake, and that she failed to take advantage of reasonable methods of correcting the mistake.* . . . In the absence of any such evidence, I agree that reasonable jurors could only find that Demko's conduct, though resulting in great misfortune, amounted to no more than negligence. (*See* App. 45-46).

With respect to Gardner, the Third Circuit also found no evidence of record that he either intentionally caused Mr. Berg's arrest or acted with the requisite "deliberate indifference" for a due process violation. The court found:

> Again, however, Berg argues that Gardner could be held liable under a due process theory of deliberate indifference. He contends that Gardner displayed such indifference when he failed "to act on his 'hunch' that perhaps an erroneous warrant did, in fact, issue." It is worth noting, however, that the record does not establish any such "hunch" on Gardner's part. (*See* App. 22) (internal citations omitted).

Even assuming that Mr. Gardner realized that a bad warrant had been issued, the Third Circuit determined that the evidence revealed that no reasonable measures were available to Mr. Gardner to reduce or eliminate any serious risk of harm. (*See* App. 22) (*citing Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (holding that "a prison official may be held liable under the Eighth Amendment . . . only if he knows that inmates face a substantial risk of serious harm and disregards that risk *by failing to take reasonable measures to abate it.*") (emphasis added).

Further, this Court has made very clear the basis for the rule that more than mere negligence is necessary to support a Constitutional violation. In *Daniels v. Williams*, 474 U.S. 327 (1986), this Court discussed in very specific terms the distinction between negligent conduct of state officials and the conduct which amounted to an arbitrary exercise of power which resulted in a harm which rose to the level of a Constitutional violation. Although this Court was confronted with a factual situation dissimilar to that presently before the Court, the general principles discussed are certainly applicable to the facts of this case.

In *Daniels*, the plaintiff slipped on a pillow negligently left in a stairway by the respondent's sheriff's department. The plaintiff in *Daniels* filed a Complaint that the conduct of the sheriff's deputies deprived him of his liberty interest and freedom of bodily injury without due process of law within the meaning of the due process clause of the Fourteenth Amendment.

This Court reasoned "[n]ot only does the word 'deprive' in the Due Process Clause connote more than a mere negligent act, but we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.' " *Daniels*, 474 U.S. at 330. The court further reasoned that where a government official's act causing injury to the life, liberty or property is merely negligent, "no procedure for compensation is constitutionally required." *Daniels*, 474 U.S. at 333. Thus, it is clearly established that lack of due care on the part of a state official does not state a cognizable claim under Section 1983.

In the case *sub judice*, the District Court as well as the Third Circuit held that Ms. Demko's actions amounted to nothing more that mere negligence. The District Court held that reasonable jurors could only find that Demko's conduct amounted to "no more than negligence." (*See* App. 46). Similarly, the Third Circuit, after analyzing the evidence of record, determined that Berg had alleged nothing more than "mere negligence" by Ms. Demko. (*See* App. 20).

Unlike petitioner's assertions, this is not a case where respondents are absolving themselves from liability by saying "it was the computer not me." Rather, Ms. Demko has acknowledged that it was her mistake that caused the erroneous warrant to be issued. Further, after reviewing the facts in evidence, both lower courts concluded that Ms. Demko's actions were merely negligent.

In his Petition, Mr. Berg cites to the "lower courts' evaluation of the testimony" and outlines six (6) factual findings. However, a review of the lower court opinions reveals that many of the findings set out by Mr. Berg were, in fact, *never* made by the lower courts. Mr. Berg's assertions that Ms. Demko knew she had issued the warrant and "deceitfully" failed to reveal that fact to Mr. Gardner are not, in any manner, supported by the lower court opinions. On the contrary, both the District Court and Third Circuit determined that such allegations were simply not supported by the record. Mr. Berg provides no citations to the lower court opinions to support that these are, in fact, the "lower courts' evaluation of the testimony." Respondents are bewildered as to the basis for these representations. It appears that many of these allegations are merely bald assertions on the part of Mr. Berg.

II. THE PETITION SHOULD BE DENIED BECAUSE *ARIZONA v. EVANS* IS INAPPLICABLE TO THE CASE *SUB JUDICE*.

Petitioner discusses and uses passages from Justice Ginsberg's dissenting opinion in *Arizona v. Evans*, 514 U.S. 1 (1995), in support of his claim that Certiorari should be granted. Mr. Berg raises *Arizona* presumably for the purpose of establishing that today's widespread use of computer systems in the field of law enforcement create the potential for human error. However, Mr. Berg's reliance on *Arizona* does not support his position that the Third Circuit erred in granting summary judgment in favor of Ms. Demko and Mr. Gardner. *Arizona* bares no application to the issue of whether these government officials acted intentionally or with "deliberate indifference" in their actions.

Arizona dealt exclusively with the application of the exclusionary rule in cases where a mistake was made by an operator of a minor judiciary's computer system. This Court held that the exclusionary rule does not require suppression of evidence seized in violation of the Fourth Amendment where the erroneous information resulted from a clerical error of court employees.

The *Arizona* Court discussed the case of *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560 (1971). In *Whiteley*, this Court "treated the identification of a Fourth Amendment violation as synonymous with the application of the exclusionary rule to evidence secured incident to that violation." *Arizona*, 514 U.S. at 13 (citing *Whiteley*, 401 U.S. at 568-569). However, the *Arizona* court stated that "later cases have emphasized that the issue of exclusion is separate from whether the Fourth Amendment has been violated." *Arizona*, 514 U.S. at 13 (citing *United States v. Leon*, 468 U.S. 897, 906 (1984)).

Therefore, *Arizona* has no bearing on this case where Mr. Berg is claiming a violation of his Fourth Amendment rights, rather than arguing application of the exclusionary rule.

III. THE PETITION SHOULD BE DENIED ON PETITIONERS SECOND QUESTION PRESENTED AS THIS QUESTION IS NOT BEFORE THIS COURT.

The second question presented by Mr. Berg states facts not consistent with the proceedings below and is not before this court. Specifically, neither the record, nor the findings of the courts below, support the averment that Mr. Gardner *determined* that an arrest warrant was erroneously issued prior to his instructions to Ms. Demko on August 16, 1994, to issue another warrant for Paul Banks. Rather, the proceedings below revealed, consistent with the deposition of Mr. Gardner, that Mr. Gardner did not determine that another warrant had erroneously been issued until January 3, 1995, when he was advised that Mr. Berg was in jail. On this additional basis, the Petition should be denied as to the second question presented by Mr. Berg.

CONCLUSION

The United States Court of Appeals for the Third Circuit and the District Court for the Western District of Pennsylvania both concluded that based on the facts of record, a reasonable jury could not find that Ms. Demko or Mr. Gardner acted intentionally or with "deliberate indifference" so as to hold them liable under the Fourth Amendment or Fourth Amendment. Further, *Arizona v. Evans* is inapplicable to this case which deals with an alleged violation of the Fourth Amendment, not the exclusionary rule. Finally, petitioners second question presented is not before this court and, therefore, the petition should be denied as to this question on this basis as well.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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